UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF NEW YORK

IN RE MF GLOBAL HOLDINGS LIMITED INVESTMENT LITIGATION	11 Civ. 7866 (VM)
JOSEPH DEANGELIS, et al., Plaintiffs, - against - JON S. CORZINE, et al., Defendants.	**DECISION AND ORDER**
This document relates to the Commodities Customer Class Actions.	

VICTOR MARRERO, United States District Judge.

By Decision and Order dated February 11, 2014 (the "Commodities Class Decision"), the Court granted in part and denied in part motions to dismiss the Consolidated Amended Class Action Complaint for Violations of the Commodity Exchange Act and Common Law (the "CAC") (Dkt. No. 382) filed by several former commodities customers of MF Global Inc. (collectively, "Plaintiffs" or the "Customers"), individually and on behalf of all others similarly situated (the "Class" or the "Customer Class"),

and as assignees of James W. Giddens, the trustee appointed in the liquidation of MF Global Inc. (the "Trustee"), against defendants Jon S. Corzine ("Corzine"), Henri J. Steenkamp ("Steenkamp"), Bradley I. Abelow ("Abelow"), Laurie R. Ferber ("Ferber"), Edith O'Brien ("O'Brien"), Christine A. Serwinski ("Serwinski"), David Dunne ("Dunne"), Vinay Mahajan ("Mahajan"), and PricewaterhouseCoopers LLP ("PwC"). In brief, the Court dismissed all claims against defendants Ferber, Serwinski, and PwC, and dismissed some (but not all) claims against defendants Corzine, Steenkamp, Abelow, O'Brien, Dunne, and Mahajan (collectively, the "D&O Defendants"). See In re MF Global Holdings Ltd. Inv. Litig., --- F. Supp. 2d ---, No. 11 Civ. 7866, 2014 WL 667481, at *25-26 (S.D.N.Y. Feb. 11, 2014) ("MF Global II").

On February 25, 2014, Plaintiffs moved, pursuant to Local Rule 6.3 ("Rule 6.3"), for reconsideration of the Court's dismissal of three claims brought on behalf of the Trustee: two claims against the D&O Defendants for breach of fiduciary duty (Counts Five and Eleven of the CAC) and one claim against PwC for professional negligence (Count Thirteen of the CAC). (Dkt. No. 666.) The D&O Defendants and PwC each filed oppositions to the motion. (Dkt. Nos.

673, 677.) For the reasons discussed below, Plaintiffs' motion for reconsideration is DENIED.

I. LEGAL STANDARD

"It is well-settled that a party may move for reconsideration and obtain relief only when the defendant identifies 'an intervening change of controlling law, the availability of new evidence, or the need to correct a clear error or prevent manifest injustice.'" Kolel Beth Yechiel Mechil of Tartikov, Inc. v. YLL Irrevocable Trust, 729 F.3d 99, 108 (2d Cir. 2013) (quoting Virgin Atl. Airways, Ltd. v. National Mediation Bd., 956 F.2d 1245, 1255 (2d Cir. 1992)). Reconsideration of a previous order by the court "is an extraordinary remedy to be employed sparingly in the interests of finality and conservation of scarce judicial resources." In re Health Mgmt. Sys., Inc. Sec. Litig., 113 F. Supp. 2d 613, 614 (S.D.N.Y. 2000) (internal quotation mark omitted). "The provision for reargument is not designed to allow wasteful repetition of arguments already briefed, considered and decided." Schonberger v. Serchuk, 742 F. Supp. 108, 119 (S.D.N.Y. 1990).

To these ends, a movant who seeks reconsideration under Rule 6.3 must demonstrate that the court overlooked

controlling law or factual matters that "might reasonably be expected to alter the conclusion reached by the court." Shrader v. CSX Transp., Inc., 70 F.3d 255, 257 (2d Cir. 1995). "Rule 6.3 is intended to 'ensure the finality of decisions and to prevent the practice of a losing party . . . plugging the gaps of a lost motion with additional matters.'" SEC v. Ashbury Capital Partners, No. 00 Civ. 7898, 2001 WL 604044, at *1 (S.D.N.Y. May 31, 2001) (quoting Carolco Pictures, Inc. v. Sirota, 700 F. Supp. 169, 170 (S.D.N.Y. 1988)). A court must narrowly construe and strictly apply Rule 6.3 to avoid duplicative rulings on previously considered issues and to prevent Rule 6.3 from being used to advance different theories not previously argued or as a substitute for appealing a final judgment. See Montanile v. National Broad. Co., 216 F. Supp. 2d 341, 342 (S.D.N.Y. 2002) ("A [motion for reconsideration] is not intended as a vehicle for a party dissatisfied with the Court's ruling to advance new theories that the movant failed to advance in connection with the underlying motion, nor to secure a rehearing on the merits with regard to issues already decided.").

II. DISCUSSION

A. CLAIMS AGAINST D&O DEFENDANTS

In Counts Five and Eleven of the CAC, Plaintiffs, as assignees of the Trustee, alleged that the D&O Defendants breached fiduciary duties owed to MF Global Inc. ("MFGI"), a wholly owned subsidiary of MF Global Holdings Limited ("MF Global"). The D&O Defendants moved to dismiss those claims on the grounds that they owed fiduciary duties only to MF Global, the sole shareholder of MFGI, and not to MFGI itself. (Mem. of Law Supp. Defs.' Corzine, Steenkamp, Abelow, Ferber, O'Brien, Serwinski, Dunne, and Mahajan's Mot. Dismiss, dated January 16, 2013 ("D&O Defs.' Joint Mem."), at 34-36, Dkt. No. 440.) The Court granted the D&O Defendants' motion to dismiss Counts Five and Eleven, ruling that Plaintiffs had waived their claims by failing to respond to the D&O Defendants' arguments in favor of dismissal. See MF Global II, 2014 WL 667481, at *15 n.15 (citing Lipton v. County of Orange, N.Y., 315 F. Supp. 2d 434, 446 (S.D.N.Y. 2004)).

Plaintiffs now argue that they did not waive their claims. (Mem. of Law Supp. Pls.' Mot. Recons. of Decision & Order ("Pls.' Recons. Mem."), at 7-10, Dkt. No. 667.) They rely largely on footnotes 74 and 104 of their main

opposition memorandum.[1] (See Customer Pls.' Mem. of Law in Response to D&O Defs.' Joint Mot. Dismiss, dated October 28, 2013 ("Pls.' Joint D&O Opp'n"), at 44 n.74, 65 n.104, Dkt. No. 549.) It is generally inappropriate to make substantive arguments in footnotes. See In re Crude Oil Commodity Litig., No. 06 Civ. 6677, 2007 WL 2589482, at *3 (S.D.N.Y. Sept. 7, 2007) ("Arguments which appear in footnotes are generally deemed to have been waived." (citing City of Syracuse v. Onondaga Cnty., 464 F.3d 297, 308 (2d Cir. 2006))). This principle alone suffices to reject Plaintiffs' arguments for reconsideration.

Even if the footnotes could serve to preserve Plaintiffs' claims, the text and context of these particular footnotes show that they did not preserve the claims here. Footnote 74 is contained in a section of Plaintiffs' memorandum that addressed the fiduciary duty claims brought on behalf of the Customers, not the Trustee. (See Pls.' Joint D&O Opp'n at 42-45 (section titled "New York Recognizes Breach of Fiduciary Duty Claims on Behalf of Creditors Against Directors and Officers").) The sentence to which the footnote is appended also focuses on

[1] Plaintiffs also cite part of the preliminary statement section of that memorandum. That section refers to the "duties [the D&O Defendants] owed to customers and creditors," not the duties owed to MFGI. (Pls.' Joint D&O Opp'n at 3.)

the Customers' claims: "[I]n this case, the D&O Defendants owe a fiduciary duty to Customers." (Id. at 44.) The footnote itself never mentions the Trustee's fiduciary duty claims. (Id. at 44 n.74.) And the footnote cites Claybrook v. Morris (In re Scott Acquisition Corp.), 344 B.R. 283, 288-89 (Bankr. D. Del. 2006), to argue that directors of an insolvent subsidiary are liable to the subsidiary's creditors (Pls.' Joint D&O Opp'n at 44 n.74) -- not, as Plaintiffs now contest (Pls.' Recons. Mem. at 12), to argue that those directors are liable to the subsidiary's trustee. Footnote 104, which is contained in a section entirely separate from any arguments about the fiduciary duty claims, similarly refers to the arguments made in footnote 74 about whether the D&O Defendants "owed [a] duty to MFGI's creditors," not whether the D&O Defendants owed a duty to MFGI itself. (Id. at 65 n.104.)

At best, the footnotes contain perfunctory and ambiguous references to the duties that the D&O Defendants owed to MFGI. Such references are insufficient to preserve Plaintiffs' argument. This is particularly true given that the current posture of this case is a motion for reconsideration. Plaintiffs must show that the Court "overlooked" their argument. Shrader, 70 F.3d at 257. The

Court did not overlook Plaintiffs' footnotes; to the contrary, the Commodities Class Decision cited the footnote 74 and rejected its arguments as it related to the Customers' fiduciary duty claims. See MF Global II, 2014 WL 667481, at *16 n.16.[2] Consistent with the footnote's text and context, the Court interpreted it as an additional argument in support of the Customers' claims. The footnote cannot now be converted to preserve the Trustee's separate claims.

Plaintiffs point to several additional arguments in their omnibus reply to the D&O Defendants' individual memoranda (Customer Pls.' Omnibus Mem. of Law in Response to D&O Defs.' Individual Supplemental Mem. of Law Supp. Joint Mot. Dismiss, dated October 28, 2013 ("Pls.' Omnibus D&O Opp'n"), Dkt. No. 550) and suggest that those arguments should serve to preserve Counts Five and Eleven. As quoted by Plaintiffs (Pls.' Recons. Mem. at 9 & n.12), none of those arguments specifically mentions Counts Five and Eleven or indicates that they oppose dismissal of those

[2] The Court rejected Plaintiffs' interpretation of Claybrook because "MFGI's insolvency still would not permit the Customers to bring claims against the D&O Defendants for breach of fiduciary duty." MF Global II, 2014 WL 667481, at *16 n.16 (citing Fox v. Koplik (In re Perry H. Koplik & Sons, Inc.), 476 B.R. 746, 797 (Bankr. S.D.N.Y. 2012)).

claims separate and apart from dismissal of the Customers' fiduciary duty claims.

"Judges are not like pigs, hunting for truffles buried in briefs." United States v. Dunkel, 927 F.2d 955, 956 (7th Cir. 1991). If it is true, as Plaintiffs claim, that the D&O Defendants' arguments were "meritless and easily disposed of" (Pls.' Recons. Mem. at 10), they should have made that clear in the main text of their main opposition brief.

Plaintiffs argue that "the complicated overlapping plaintiff constituencies and claims and the lengthy and complex briefing" caused the Court to overlook their arguments. (Pls.' Recons. Mem. at 7.) This is all the more reason that Plaintiffs should have specifically separated and delineated their oppositions to the D&O Defendants' motions to dismiss the Trustee's fiduciary duty claims and the Customers' fiduciary duty claims. Plaintiffs themselves created the "complicated overlapping plaintiff constituencies" when they agreed to pursue the Trustee's claims as his assignee. In light of that agreement, Plaintiffs' failure to clearly highlight which of their arguments responded to the motion to dismiss Counts Five and Eleven is inexcusable.

Finally, the Court notes that Plaintiffs, in their motion for reconsideration, fail to meet their burden of pointing to "controlling decisions" in favor of their claim that the D&O Defendants owed a fiduciary duty to MFGI. See Shrader, 70 F.3d at 257. Delaware law governs the Trustee's fiduciary duty claim. See MF Global II, 2014 WL 667481, at *14 n.14. Plaintiffs have cited no decisions of either the Delaware Supreme Court or the Second Circuit Court of Appeals, which would be binding on this Court.

The Court is thus persuaded that reconsideration of the Commodities Class Decision's dismissal of Counts Five and Eleven is not warranted. Having failed to adequately argue their claim in the first instance, Plaintiffs cannot now use the extraordinary remedy of Rule 6.3 to revive claims that they previously waived. The Court therefore denies Plaintiffs' motion for reconsideration as to Counts Five and Eleven.

B. CLAIMS AGAINST PwC

Count Thirteen of the CAC alleges professional negligence and is brought on behalf of the Customers and the Trustee. In the Commodities Class Decision, the Court dismissed Count Thirteen in its entirety. See MF Global II, 2014 WL 667481, at *21-25. Specifically with respect

to the Trustee's claim, the Court, relying on the New York Court of Appeals' decision in Kirschner v. KPMG LLP, 938 N.E.2d 941 (N.Y. 2010), ruled that the doctrine of in pari delicto barred the Trustee's claims against PwC. See MF Global II, 2014 WL 667481, at *23-25.

Plaintiffs move for reconsideration only of the dismissal of the Trustee's claim.[3] They argue that reconsideration is warranted because (1) Kirschner's application of in pari delicto does not apply in the context of the regulatory scheme at issue here (Pls.' Recons. Mem. at 15-16); and (2) the Court should not resolve issues relating to the in pari delicto defense on a motion to dismiss (Pls.' Recons. Mem. at 16-17). Plaintiffs' arguments merely relitigate issues that the Court resolved in the Commodities Class Decision. Such relitigation is improper on a motion for reconsideration. See Montanile, 216 F. Supp. 2d at 342.

The Court previously considered and rejected Plaintiffs' efforts to distinguish Kirschner. See MF Global II, 2014 WL 667481, at *24 ("Plaintiffs seek to distinguish Kirschner on two grounds."); id. at *25 ("The

[3] The Court separately dismissed the Customers' claim in Count Thirteen for "failure to allege any direct 'linking conduct' between the Customers and PwC." MF Global II, 2014 WL 667481, at *23. Plaintiffs do not move for reconsideration of that dismissal.

Court . . . concludes that Kirschner directly controls the outcome here."). Plaintiffs now focus on the duty PwC owed to MFGI; they argue that "[w]here the literal duty on a defendant is to perform functions to prevent intentional or unintentional wrongdoing, in pari delicto provides no defense that the wrongdoer was successful in the face of negligent conduct by the defendant." (Pls.' Recons. Mem. at 16.) But they cite no law -- much less "controlling" law, see Shrader, 70 F.3d at 257 -- in support of that claim.

The Court is not persuaded that Plaintiffs' view of the law is correct. As noted in the Commodities Class Decision, "Kirschner focuses . . . on the relative fault of the plaintiff and the defendant." MF Global II, 2014 WL 667481, at *25. In other words, the source of the duty imposed on a defendant does not affect an in pari delicto analysis; a court must only consider the assignment of blame only for alleged breaches of that duty. "Here, the only reasonable inference that can be drawn from the facts in the CAC is that MFGI 'bears at least substantially equal responsibility for the violations [it] seeks to redress[.]'" Id. (alterations in original) (quoting Pinter v. Dahl, 486 U.S. 622, 633 (1988)).

The Court also previously considered and rejected Plaintiffs' argument that the in pari delicto defense is not available on this motion to dismiss. "While a claim of in pari delicto sometimes requires factual development and is therefore not amenable to dismissal at the pleading stage, the doctrine can apply on a motion to dismiss if its application is 'plain on the face of the pleadings.'" Id. at 23 (citation omitted) (quoting Picard v. JPMorgan Chase & Co. (In re Bernard L. Madoff Inv. Sec. LLC), 721 F.3d 54, 65 (2d Cir. 2013)). Plaintiffs argue now that if a factfinder "finds no wrongdoing by the D&O Defendants, then any defense by PwC on the basis of the in pari delicto doctrine entirely collapses." (Pls.' Recons. Mem. at 17 (emphasis omitted).) Again, Plaintiffs cite no law, controlling or otherwise, in support of this proposition.

And again, the Court is not persuaded that Plaintiffs' legal theory on this point is correct. The gravamen of Count Thirteen is that PwC's negligent conduct led to MFGI's improper transfer of customer funds. According to the CAC, the D&O Defendants actually committed the improper transfer. Thus, the harm that PwC caused to MFGI resulted only because of the voluntary acts of the D&O Defendants, and those voluntary acts are imputed to MFGI itself. See

MF Global II, 2014 WL 667481, at *23 ("The traditional principle that a corporation is liable for the acts of its agents and employees applies with full force to the in pari delicto analysis." (citing Kirschner, 938 N.E.2d at 950-51)). On these facts, to the extent that PwC breached any duty of care, MFGI "'bears at least substantially equal responsibility for the violations [it] seeks to redress[.]'" Id. at *25 (alterations in original) (quoting Pinter, 486 U.S. at 633). That principle holds true even if the D&O Defendants are cleared of wrongdoing.

A motion for reconsideration should not be used for "repetition of arguments already briefed, considered and decided." Schonberger, 742 F. Supp. at 119. Plaintiffs have raised no new, controlling law or facts in connection with the Trustee's claim against PwC. The Court thus denies Plaintiffs' motion for reconsideration as to Count Thirteen.

III. ORDER

For the reasons discussed above, it is hereby

ORDERED that the motion (Dkt. No. 666) of Plaintiffs Paradigm Global Fund I Ltd. and Kay P. Tee, LLC, et al., for Reconsideration of the Decision and Order is **DENIED**.

SO ORDERED.

Dated: New York, New York
11 March 2014

Victor Marrero
U.S.D.J.